National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: June 17, 1992

F. Rozier Sharp, Regional Director, Region 17

Robert E. Allen, Associate General Counsel, Division of Advice

Oklahoma Aerotronics, Inc., Case 17-CA-15783

133-8200-0000-0000, 177-2401-6750-3300, 460-5033-2550-1700, 530-4825-6700-0000, 530-4825-9100-0000

This case was resubmitted [(1)] for advice as to (1) whether an Employer, owned in part by an employee stock option plan (ESOP) in which unit-employee shareholders participated in electing the members of the Board of Directors, had a bargaining obligation under Section 8(a)(5); and (2) whether the purchaser of the Employer's assets, who purchased "free and clear" through a bankruptcy court auction constitutes a Golden State [(2)] successor. [(3)]

FACTS [(4)]

Oklahoma Aerotronics, Inc. (Employer) is a small producer of primarily electronic components under contract with the United States Department of Defense. It had a collective bargaining relationship with the International Union, United Automobile, Aerospace & Agricultural Implement Workers (UAW), AFL-CIO, and its Local No. 1679 (the Union) for about 25 years. Their most recent collective bargaining agreement by its terms expired on November 11, 1991.

Beginning in 1975, the Employer had an employee stock ownership plan (ESOP) in which employee shareholders (both unit and non-unit) owned between 82 percent and 85 percent of the stock. The ESOP was governed by a constitution and by-laws, which established a trust for almost all of the employee-owned stock. [(5)] Under the plan, a four-member ESOP Committee was created under which the incumbent President was a voting member/trustee. Two of the remaining three trustees were required to be from the UAW unit and one was to be a non-unit employee. All three trustees were elected by voting among all personnel eligible for the ESOP, which at the time included 30 employees in the UAW unit and 50 individuals in non-unit positions. All plant personnel shared in stock ownership more or less equally, differing only in the percentage each held based on his or her yearly earnings.

The Employer's business was managed by a Board of Directors with eight members, four of whom were the ESOP trustees. The participant-employees of the ESOP elected by majority vote the four members of the Board, including the President, who comprised the ESOP Committee, who, in turn, selected the four additional members of the Board from either the unit or elsewhere. Each ESOP trustee voted 25 percent of the stock held by the trust, or 20 percent of the total amount of stock. As of July 1991, three members of the Board of Directors were union officers until subsequently one such member was promoted to a management position. The two remaining employees retained their responsibilities as union officers. The extent of the Board members' participation in the Employer's business decisions is unknown.

Under the ESOP plan, the Employer's day-to-day operations, including the hiring and disciplining of managers and employees, were charged to the President. Specifically, the corporate by-laws reserved to the President a number of specific managerial duties:

He shall appoint and remove, employ and discharge, and fix the compensation for all servants, agents, employees and clerks of the Corporation other than the duly appointed officers, subject to the approval of the Board of Directors.

On May 22, 1991, [(6)] the Employer filed a bankruptcy petition for protection under Chapter 11 of the Bankruptcy Code. About this time, the Employer closed its facility and laid off all of its employees. On or about July 1, the Employer reopened the plant and recalled some employees. On the day the plant reopened, the Employer indicated to the employees that the Union's collective bargaining agreement had been "set aside" as a result of the Chapter 11 filing.(7) The Employer announced wholesale abandonment of pre-existing contractual benefits, such as vacation pay, sick leave, health insurance, as well as a 20 percent cut in wages.

On August 1, the Union filed the instant Section 8(a)(5), (3) and (1) charge specifically alleging that the Employer refused to bargain regarding outstanding grievances over the above unilateral actions, refused to meet regarding contractual issues, and engaged in activities to undermine the Union and discourage union activities. On September 17, the Employer petitioned the bankruptcy court and was granted permission to retain special labor counsel to defend against these charges.

On or about September 30, the Employer shut down its facility, leaving no indication that operations would resume. On October 17, the Union attempted to file a class proof of claim in the bankruptcy proceeding as collective-bargaining representative on behalf of the employee unit. On November 12, the bankruptcy judge rejected the Union's class proof of claim, but ordered the Union to file with the bankruptcy court a categorized list of all employee claimants with potential administrative and priority claims. Thus, it appears that the employees were allowed the opportunity to timely file individual post-petition proofs of claim seeking to recover the involuntary 20 percent wage reduction and other administrative expenses such as vacation and sick leave benefits and unpaid medical claims due under the contract.(8) The Region did not file a proof of claim or entry of notice of appearance with the bankruptcy court, and did not participate in the bankruptcy court proceedings on behalf of the Board.

On November 22, the Employer's assets were purchased for $100,000 "free and clear" by OAI, Inc. (OAI) through a public auction conducted by the bankruptcy court pursuant to a Joint Chapter 11 Plan of Reorganization.(9) The Region has indicated that the payment tendered at the auction apparently was not for the purchase of the Employer's assets, i.e., the building, inventory and equipment, but essentially provided OAI the authorization to obtain by novation the right to perform and receive payment, and to renegotiate any and all of its outstanding contracts with the Department of Defense.

In addition, as a consequence of the auction, the bankruptcy court declared the ESOP stock worthless, leaving the employees with no payment for their stock ownership in the Employer. The bankruptcy court order of sale did not address the existence of the ESOP Committee or the Employer as a corporate entity in the bankruptcy proceeding.

As of December, it appears that most of the employees had accepted offers of $50.00 from OAI in settlement of their administrative expense claims filed with the bankruptcy court. There is no evidence indicating which and how many employees agreed to settle their claims, or what they agreed to by releasing such claims.

OAI is presently operating the facility with the entire management and support staff, including supervisors, that had been previously employed by the Employer. Only OAI's current President and Vice President were not formerly associated with the Employer. To date, OAI's employee complement ranges from 20 to 39 employees. On March 23, 1992, the Union made a demand for recognition. By letter dated April 3, 1992, OAI specifically denied the Union's demand. Subsequently, on or about April 15, 1992, the Union filed a refusal to bargain charge against OAI. In Case 17-CA-18738, the Region has concluded that OAI violated Section 8(a)(1) by telling applicants that it would hire only 50 percent of the Employer's work force to avoid a union majority, Section 8(a)(3) by refusing to hire the Union president and his wife, and Section 8(a)(5) as a Burns(10)- Love's Barbeque(11) successor.

ACTION

We conclude that a Section 8(a)(5) and (1) complaint (12) should issue, absent settlement, against OAI, Inc. as successor to the Employer for the following reasons: (1) the nature of the Employer's employee stock option plan (ESOP) does not bar a bargaining order against the Employer, (2) OAI, as the purchaser of the Employer's assets through an auction of the bankruptcy court, constitutes a Golden State successor with an obligation to remedy the Employer's unfair labor practices, and (3) a complaint seeking an appropriate remedy against OAI, as a Golden State successor who purchased the assets "free and clear," is not barred by the bankruptcy court order.(13) The Region should also argue in the alternative that even if OAI cannot be a

Golden State successor, OAI is nonetheless obligated to bargain with the Union under Gissel.[(14)]

The ESOP Would Not Have Precluded a Bargaining Order Against the Employer

In Harrah's Lake Tahoe Resort Casino,[(15)] the Board recently held that an employee's activities on behalf of an ESOP proposal to purchase 50 percent of the Employer's parent corporation were not protected by Section 7 of the Act because the "strategic overall objective" of the proposal was to transfer ownership and control to employees, and any benefits that would flow to employees presupposed corporate ownership.[(16)] In discussing the ESOP, the Board drew an analogy to cases involving employee-owned cooperatives. The Board cited Red & White Airway Cab Co.,[(17)] and Sida of Hawaii, Inc.,[(18)], for the broad proposition that the Board has excluded employee-stockholders from bargaining units when they collectively have an effective voice in determining or formulating corporate policy through their authority to select directors.[(19)] The Board did not cite cases where it has held that stock ownership may not be the determinative factor of nonprotected status and has instead held that the issue is "the degree of participation in management and/or labor policy formulation"[(20)] and whether the shareholder has an "effective voice" in that activity.[(21)]

The Board did note, however, that any 50 percent shareholder, including an ESOP trust, would as a practical matter exercise effective control over every detail of corporate policy.[(22)] In this regard, we recognize that the degree of employee ownership in an ESOP may pose a problem when the Board must consider whether a bargaining obligation may be imposed on an ESOP-majority controlled employer. Indeed, in Sida of Hawaii, supra, the Board specifically noted that, if the stockholders were included in the unit, the employer's officers and directors "would, in effect, be placed in a position of bargaining with stockholder drivers who held the power to oust them from their positions, a situation hardly conducive to arm's length collective bargaining."[(23)] Nevertheless, we conclude that Harrah's would not bar issuance of a bargaining order against the Employer, since the record in the instant case indicates the unit employees did not hold the majority of stock and did not have the ability to control the determination of the Employer's corporate policy. Thus, the employee-shareholders in this case retained their status as unit employees protected by the Act.

The facts here, different from those in Harrah's, indicate that the employees' shares in the Employer entitled them, at most, to vote for the Board of Directors. Both unit and non-unit employees participated in the ESOP. However, 50 nonunit individuals but only 30 unit employees were eligible to participate in the ESOP. Thus, it appears that the employee shareholders in the instant case, unlike the shareholders in Harrah's, Sida, and Red and White, were only a minority. The participants in the ESOP elected three members of the ESOP Committee, who, with the Employer's President, also a member of the ESOP Committee, in turn, selected the four additional members of the Board from either the unit or elsewhere. During all relevant times, only two Union representatives served on the eight-member Board through membership in the ESOP Committee. These representatives were clearly a minority of the Board and, without more, would not have given the unit employees as a group control over the Employer. Moreover, the unit employees were not afforded any preferential treatment by virtue of their membership on the Board or for their corresponding membership on the ESOP Committee created by the Plan. The employee-shareholders apparently were not given any other powers nor were they ever informed of any rights or responsibilities they possessed as a consequence of such ownership. There is no evidence that the unit employee shareholders voted as a bloc to usurp control over the Employer's operations. The President clearly ran the day-to-day operations, including the disciplining and hiring of employees. More importantly, the employee-shareholders did not, as a unit or through their minority representation on the Board, participate in any management conferences or participate in the determination of the Employer's policies. Lastly, there is nothing to suggest that the two Union officials on the Board and ESOP Committee ever compromised their statutory obligation to act solely in the interest of the unit employees. The Union officer-directors did not intermingle their bargaining and grievance-handling duties with their director/trustee responsibilities to the Board.

Thus, we concluded that unit employee participation in the ESOP would not have barred the issuance of a bargaining order against the Employer. However, as a consequence of the bankruptcy court auction and sale of its assets, the Employer no longer exists; thus, the Board cannot seek a meaningful remedy from the predecessor Employer.

OAI Constitutes a Golden State Successor

We conclude that, because the Employer no longer exists, the only viable way to obtain an appropriate remedy will be to issue a complaint against the purchaser OAI as Golden State successor.

In Golden State Bottling Co., supra, the Supreme Court adopted the Board's Perma Vinyl [(24)] holding that an employer that acquired a business with knowledge of the predecessor's unfair labor practices, and that continued operating the business "without interruption or substantial change" was liable to remedy the predecessor's Section 8(a)(3) and (1) violations. [(25)] The new employer will be a Golden State successor if there is substantial continuity of the employing enterprise after the transfer of the business. [(26)] In determining whether "substantial continuity" exists, the Board considers factors such as continuity in business operations, plant, work force, jobs and working conditions, supervisors, machinery and equipment, methods of production, products or services, and customers. [(27)]

It is clear that OAI meets the Board's continuity test. The principals of Manhattan, as investors, formed, incorporated, and capitalized OAI, Inc. to perform and assume by novation certain of Employer's DOD contracts, and to employ certain of the former employees of Employer. The Region has concluded that OAI would have hired a majority of the Employer's employees, but for its unlawful plan to avoid the Union. The Region has also determined that OAI has the same managers and supervisors as did the Employer. We assume that the products, the methods of production and the nature of its business operations are likely to continue without substantial change since OAI basically purchased the right to novate and assume responsibility for the Employer's outstanding DOD contracts. Moreover, OAI intended to lease the Employer's manufacturing facility and equipment. [(28)] We note that OAI may not be successful in retaining all of the Employer's former business. However, the Board has clearly held that a new employer that operates a smaller business, or only a part of a predecessor's business, may be a successor if other relevant facts show substantial continuity of the employing industry. [(29)]

As stated above, Golden State liability also requires evidence that the successor purchased the predecessor's assets with knowledge of the pending unfair labor practices. To hold a successor liable for its predecessor's unfair labor practices, the Board does not require evidence that the successor knew that unfair labor practice charges had been filed prior to the takeover of the business; the successor merely must have notice, in some form, of the facts of the unfair labor practices. [(30)] Therefore, the issuance of a complaint or imposition of a Board order is likewise not required to supply knowledge. Lastly, in determining whether the successor had knowledge, the Board is not bound by the successor's denials of knowledge. The Board will conclude that the successor had the requisite knowledge if reasonable inferences from the record as a whole support such a finding. [(31)]

As to OAI's knowledge, the determinative factor in the instant case, there is concededly no firm proof in the record that OAI knew of the Employer's alleged unfair labor practices when it took over the Employer's operations and assumed its DOD contracts. Thus, the question becomes whether actual or constructive knowledge of the alleged unfair labor practices and subsequent charge against the Employer can be imputed to OAI through the notations in the bankruptcy court docket and documents filed with the bankruptcy court which reference the specific NLRB charge.

Specifically, the strongest evidence of OAI's knowledge is the notation in the bankruptcy court docket, dated September 17, 1991, referring to the authorization by the court of the Employer's application to retain of "Counsel for a Special Purpose." The bankruptcy court record contains the original petition by the Employer detailing its request to appoint labor counsel to defend the instant NLRB charges filed against the Employer for its alleged unlawful post-petition conduct, cited therein with case name and number. The petition also includes an attached copy of the charge. [(32)] Thereafter, the fee for the appointed labor counsel's law firm is referred to in the Joint Chapter 11 Plan of Reorganization dated November 12.

We conclude that the presence of this material in the bankruptcy court docket and record was sufficient to give OAI the knowledge necessary for Golden State purposes. The purpose of bankruptcy court records is to centralize information about the assets and liabilities of the debtor in order to allow purchasers to make informed decisions concerning the value of the bankrupt employer's business before the completion of any transaction. Thus, it is not unreasonable to assume that a purchaser in bankruptcy court will exercise a degree of due diligence by making at least an inquiry into the financial records of the debtor's business as well as into the list of assets and liabilities to determine the existence of any liens, claims or encumbrances in order to adequately negotiate its potential liability. [(33)] Thus, it is appropriate to conclude in the instant case that OAI, on its own initiative or through its attorney, examined the bankruptcy files to ascertain the substance and amount of any and all claims existing against the Employer since OAI was preparing to bid for the Employer's assets at the bankruptcy auction. (34) Furthermore, OAI may not be able to claim that it was involved only in the bankruptcy court auction since evidence indicates that OAI's investors had shown some interest in purchasing the Employer months before and may have become aware of the charges during that time. There is also evidence that Ron Stoots, President of OAI, spent weeks going through papers at the plant, including the minutes of the Board of Director meetings. Again, it is reasonable to assume that he, as agent, could become aware of the unfair labor practices through his repeated visits to the facility. (35)

We conclude that these factors, when taken together, are sufficient to impute knowledge to OAI.

OAI's "Free and Clear" Purchase Does Not Defeat OAI's Successorship Obligation

At first blush, this case would appear to pose a difficult vehicle to use to seek a remedy because OAI as successor purchased the Employer's assets "free and clear" through the bankruptcy court auction. In addition, as of the date of the "free and clear" purchase, only a charge had been filed against the Employer for its alleged unfair labor practices. Moreover, the Region never filed a proof of claim or notice of appearance and thus never participated in the bankruptcy proceedings.

However, under extant Board law, OAI can still be held liable for the Employer's unfair labor practices. In International Technical Products Corp., supra, the Board held a successor employer liable for the unsatisfied portion of backpay even though the successor had purchased the assets free and clear of all liens, claims and encumbrances in a judicial sale pursuant to authority of the bankruptcy court. A complaint and Board order had already issued prior to the purchase. In so holding, the Board reasoned that its order, which enforces a public rather than a private right, reached beyond the assets of the employer and attached to the employing enterprise itself. As the Board further observed, "the authority to modify or set aside the order upon which the claim is based vests exclusively with the Board and the appropriate reviewing federal courts, and not the bankruptcy courts." (36)

We recognize, however, that in subsequent cases, the Board has not cited ITP for its holding about the effect of a "free and clear" sale, but for ITP's more limited teaching that bankruptcy proceedings do not foreclose Board remedial action. (37) We note further that, in ITP, the Region filed a timely proof of claim, and that fact seems to have been relied on by the Board in finding the successor liable despite the court's "free and clear" order. (38)

We realize that the fact that the bankruptcy proceedings are now closed and the Employer no longer exists eliminates the Board's ability to issue a remedial order against the Employer. However, the absence of the proof of claim does not diminish the Board's authority to rule on the merits of the instant charge. (39) The effect on the bankruptcy proceedings of the Region's failure to file a timely proof of claim is a matter for OAI, if it so desires, to litigate before the bankruptcy court. (40) Therefore, we conclude that the fact that OAI bought Employer's assets "free and clear" at a bankruptcy auction is irrelevant for purposes of successorship under extant Board law; (41) therefore, in the instant case, OAI's liability as successor is not extinguished by the court's order transferring the Employer's assets "free and clear."

The Region Should Argue in the Alternative that OAI is Obligated To Bargain with the Union under Gissel

We realize that some of our conclusions concerning the ESOP and the effect of the bankruptcy sale of the Employer raise novel and difficult legal conclusions. Therefore, the Region should argue that even if it is concluded that the ESOP would have barred issuance of a remedial order against the Employer and that, therefore, OAI could not be a Golden State successor, OAI is, nonetheless, obligated to recognize and bargain with the Union. (42) The Union and Employer have had a 25-year collective bargaining history which has resulted in multiple contracts containing union-security clauses. The Union made a proper demand for recognition to OAI, which OAI rejected. Moreover, the Region concluded that OAI deliberately avoided hiring a union majority and refused to hire the Union president and his wife. Seeking a Gissel bargaining order is appropriate where, as in the instant case, an employer engages in conduct having a direct adverse effect on the employment status of selected employees in the bargaining unit and undermines the previously existing majority strength of the union. (43)

Consistent with the foregoing analysis, the Region should issue a complaint against OAI as a Golden State successor, absent settlement. In addition, the Region should also argue in the alternative, that even if a bargaining order against the Employer would not have been appropriate based on the ESOP, thus precluding treating OAI as a Golden State successor, OAI is nonetheless obligated to bargain with the Union under Gissel.

R.E.A.

---

[1] **In Oklahoma Aerotronics, Inc., Case 17-CA-15738, Advice Memorandum dated December 19, 1991, the Region was directed to obtain additional information relevant to the submitted issues.**

[2] **Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).**

[3] **See International Technical Products Corp., 249 NLRB 1301 (1980).**

[4] **The evidence obtained in the Region's additional investigation is included herein.**

[5] **The trust contained approximately 80 percent of the total ESOP stock. The remaining stock was apparently owned by local business people.**

[6] **All events occurred in 1991, unless otherwise noted.**

[7] **There is no evidence that the Employer either sought or received permission from the bankruptcy court to set aside its labor agreement.**

[8] **It is not clear whether all employees who could have filed claims did in fact do so, and whether those who filed asked for a complete remedy.**

[9] **The Region has found that OAI and the Employer are separate and distinct entities. It appears that OAI's President, Ron Stoots, owns all the voting stock of OAI. In addition, the Union and the bankruptcy court apparently understood that Manhattan Construction (Manhattan), a major commercial construction contractor where Stoots was an executive before he resigned to run OAI, would be bidding for the Employer's assets, and that the emergence of OAI as the only bidder was unexpected.**

[10] **NLRB v. Burns Security Services, 406 U.S. 272 (1972).**

[11] **Love's Barbeque Restaurant No. 62, 245 NLRB 78 (1979), enf'd in rel. part and mod. sub nom. Kallman v. NLRB, 640 F.2d 1094 (9th Cir. 1981); U.S. Marine Corp., 293 NLRB 669, 672 (1989), enfd. 916 F.2d 1183 (7th Cir. 1990), rehg. en banc 944 F.2d 1305 (7th Cir. 1991).**

[12] **The merits of the Section 8(a)(3) allegation were not submitted for advice.**

[13] **Further Board proceedings against the Employer are barred by the conclusion of the bankruptcy proceedings.**

[14] **NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).**

[15] **307 NLRB No. 29 (April 21, 1992).**

[16] **307 NLRB No. 29, slip op. at 2.**

[17] **123 NLRB 83, 85 (1959).**

[18] **191 NLRB 194, 195 (1971).**

[19] **307 NLRB No. 29, slip op. at 3-4, n.5. In Red & White Airway Cab, 38 owner-driver stockholders were excluded from the unit of nonstockholders because the stockholders annually elected the entire board of directors, which supervised a paid manager, and the stockholders received preferential treatment not enjoyed by nonstockholders. In Sida, 115 of the 142 stockholders of the company were active drivers with each stockholder owning a maximum of one share of stock. The Board excluded the stockholder employees because they had almost complete control over the selection of officers and directors who had charge of managing the company, and they enjoyed preferential treatment over nonstockholders.**

[20] **Airport Distributors, Inc., 280 NLRB 1144, n. 2 and 1150 (1986); Mutual Rough Hat, 86 NLRB 440, 444 (1949) (employee-directors were held to be employees because the officers held all**

control, and none of the stockholders participated in management conferences or determined management policy); Everett Plywood & Door Corp., 105 NLRB 17,19 (1953) (all the unit employees were shareholders and they owned 365 of the 480 outstanding shares); Coastal Plywood & Timber Co., 102 NLRB 300, 302 (1953) (employees were limited to one share, and there were 250 shareholders of whom 50 were in the unit and 30 were supervisors); S-B Printers, Inc., 227 NLRB 1274 (1977) (38 of the employer's 45 employees were shareholders, including 10 of the 13 unit employees; nevertheless, the Board found that they owned only one quarter of the shares and there was no reason to believe they would vote as a bloc). In these cases, the shareholder-employees who performed unit work did not enjoy any preferential working conditions over non-shareholders.

[21] See Alderwood Products Corp., 81 NLRB 136 (1949); Brookings Plywood Corp., 98 NLRB 794, 798 (1952).

[22] 307 NLRB No. 29, slip op. at 3.

[23] 191 NLRB at 195.

[24] Perma Vinyl Corp., 164 NLRB 968 (1967), enfd. sub nom. United States Pipe and Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968).

[25] Golden State Bottling v. NLRB, supra, 414 U.S. at 184-185.

[26] The Bell Co., 243 NLRB 977 (1979).

[27] Aircraft Magnesium, 265 NLRB 1344, 1345 (1982), enfd. 730 F.2d 767 (9th Cir. 1984), cited in Fall River Dying and Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987); Great Lakes Chemical Corp., 280 NLRB 1131, 1132 (1986) (Burns and Golden State successorship found).

[28] By a letter dated November 6, 1991, the attorney for Manhattan sent notice of its intent concerning the transfer of assets of Oklahoma Aerotronics, to the Employer, First National Bank and Trust Co. of McAlester, Oklahoma, the owners of its assets during the bankruptcy, and the Small Business Administration, detailing its business plans in connection with the operation of OAI.

[29] See, for example, Saks Fifth Avenue, 247 NLRB 1047 (1980), enfd. 634 F.2d 681 (2d Cir. 1980); Band-Age, Inc., 217 NLRB 449 (1975), enfd. 534 F.2d 1 (1st Cir. 1976).

[30] Cumberland Nursing Center, 263 NLRB 428, 434 (1982); St. Mary's Foundry Company, 284 NLRB 221, 234 (1987), enfd. 860 F.2d 679, 681-682 (6th Cir. 1988)(knowledge imputed to successor even though charges were filed after sale was approved; it was not necessary for successor to have seen the particular charges or complaint).

[31] M & J Supply Co., 300 NLRB No. 45, slip op. at 3 (1990), citing Golden State, 414 U.S. at 172-174.

[32] See Airport Bus Service, Inc., 273 NLRB 561 (1984). There, the ALJ had determined that evidence in the bankruptcy court docket referring to actions by the Board in the ULP proceeding, in conjunction with the search conducted by the employer's attorney into the court documents, was adequate to put the employer on notice of the unfair labor practices committed by its predecessor. However, the Board declined to find successorship on other grounds and therefore never reached the issue of knowledge. But see St. Mary's Foundry, supra, 284 NLRB at 221, n.4.

[33] See the following language in Golden State, 414 U.S. at 185, quoting Perma Vinyl, 164 NLRB at 969:

[The successor's] potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liabilities arising from the seller's unfair labor practices.

[34] For example, an employer cannot plead lack of knowledge of the details of its predecessor's unfair labor practices where it has employed attorneys to negotiate the purchase and sale agreement with the predecessor employer. See M & J Supply Co., supra, slip op. at 7; Airport Bus Service, supra; Winco Petroleum Company, 252 NLRB 1049 (1980) enfd. 688 F.2d 973 (8th Cir. 1982) (knowledge found on the basis of a comment of the predecessor's president to the successor that he was having "union problems" and because the predecessor's financial report which included a large amount of legal fees was made available during purchase negotiations.)

[35] This presumption is based upon the position expressed by the Board in Am-Del Co., Inc., 234 NLRB 1040, 1041 (1978), that "the responsibility of establishing that a new employer is without knowledge of the predecessor's ULPs at the time it took over the latter's operation rests with the alleged successor." See Navajo Freight Lines, Inc., 254 NLRB 1272, 1281-82 (1981) (no successorship was found based on the prima facie showing by the alleged successor that it was without knowledge even though the shop superintendent, who had knowledge of the ULP litigation, continued to work for the new employer, and the sales agreement, which contained a general indemnification clause, did not refer to the ULP charge pending against the predecessor).

[36] ITP, 249 NLRB at 1303.

[37] See Evans Plumbing Co., 278 NLRB 67 (1986); Better Building Supply Corp., 283 NLRB 93, 96-7 (1987).

[38] ITP, 249 NLRB at 1302-3.

[39] Airport Bus Service, supra at 563.

[40] Airport Bus Service, supra, at 563 n.15. Cf. Field Bridge Associates, 306 NLRB No.72 (1992) (finding that the Board should not be collaterally estopped by the resolution of private claims asserted by private parties.)

[41] International Technical Products Corp., supra.

[42] Cf. Monroe Auto Equipment Co., 230 NLRB 742 (1977) (the Board held that the presumption of continuing majority status arising from a 19 year old certification and bargaining history was a valid basis for concluding that the Union enjoyed majority status and warranted issuance of a Gissel bargaining order after another union filed an election petition, the employer engaged in major unfair labor practices, and a majority of employees voted against union representation).

[43] See NLRB v. Gissel Packing, supra.